United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-1174

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

-against-

JAMES REED,

Defendant-Appellant

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

- v - : DOCKET NO. 75-1174

JAMES REED, :

Defendant. :

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On Appeal from the United State District Court
for the Southern District of New York

REPLY BRIEF OF APPELLANT

Respondent has minimized the thrust of appellant-defendant's eight points and in the process has mobilized a battery of cases most of which can be distinguished on the issues pressed by appellant. A number of those cases support the very positions respondent seeks to controvert.

Answering Point I

In an attempt to defuse Point I of defendant's argument, respondent asserts that there was no error in misleading defense counsel on the issue of electronic surveillance because respondent turned over a transcript of the electronic surveillance it had previously denied existed "three days before trial." Not mentioned in this riposte is the fact that a Huntley hearing proceeded on February 10, 1975,

the day the transcript was delivered. The next day, defense counsel went to Albany to argue a case in the New York Court of Appeals for which she had a long standing appointment and for which she was excused - - the next day, Lincoln's Birthday - - was a court holiday and the case then proceeded to trial over defense counsel's objection on February 13, 1975.

It is to be recalled that the prosecution never moved to amend its response to the request for a Bill of Particulars (which previously denied the existence of any electronic response), nor did the court accede to defense counsel's request for an adjournment to meet the surprise of the production of a tape and transcript of a conversation of defendant with law enforcement officers.

Accordingly, counsel is puzzled by respondent's reference to Rule 7 (f) providing for amendment to a Bill of Particulars. Respondent made no effort to amend its response. Moreover, respondent successfully opposed counsel's request for a continuance and none was granted even though the case went over from February 10th, to the next court day (after one day for court argument in Albany), February 13,1975.

In United States v. Pellegrino 273 F. 2d 570 (2 Cir 1970) this Court held that there was no abuse of discretion in the trial court's permitting the filing of an amended Bill of Particulars where "defendant's counsel stipulated that a one day continuance would be sufficient." The key error below

recognized repeatedly by appellate courts was the refusal of the court below to grant defendant a reasonable adjournment to prepare in the face of defense counsel's urgent plea for such continuance, having been surprised by the new turn of events which revealed electronic surveillance United States v. Glaze 313 F. 2d 752 (2 Cir 1963). In United States v. Silverman 449 F. 2d 1341 (2 Cir 1971) cert. den. 405 U.S. 918 (1972), the government, months befor trial, supplied the defendant with a detailed and correct schedule. Other of cases cited by respondent emphasized the lack of prejudice occasioned to defendant's case. See United States v. Birrell 447 F. 2d 1168 (2 Cir 1971) United States v. Perez 489 F. 2d 93 (5 Cir 1974) cert. den. 396 U.S. 1053 (1970). Repeatedly courts say that the remedy for surprise is the granting of a continuance to defense counsel to prepare. United States v. Cirillo 499 F. 2d 872 (2 Cir) cert. den. 419 U.S. 1056 (1974); United States v. Burgos 269 F.2d 763 (2 Cir 1959) cert. den. 362 U.S. 942 (1960); United States v. Edelman 414 F. 2d 539 (5 Cir 1974) The prejudice in the case at bar was profound. Defense counsel never had an opportunity to review the facts carefully with the defendant. The record of the trial* shows an unexplained inconsistency between the substance of the tape recordings and the testimony of the

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* See Appellant's fact statement in Brief for Appellant pp. 9-13.

prosecution witnesses. Counsel - - because of the pressure of time and the court's refusal of any adjournment - - was never able to adequately work out the true significance of that inconsistency.

Answering Point II

Respondent has failed to meet the issue squarely presented by appellant's Point II. The court having been asked to inquire on the issue of race on the voir dire of the jury, had an obligation mandated by federal law and the Constitution to do so. That failure in the face of a request, and particularly against the background of equivocal evidence of guilt, constituted reversible error.

Respondent has set forth in haec verba the record on this issue. (Resp. Br. pp. 8,9) Defense counsel prepared two questions which she believed would reveal whether or not the prospective jurors had any racial prejudice in a case involving a black defendant. The court refused to ask those questions but offered to ask

> " whether anybody on the jury has any prejudice because of the defendant's membership (sic) in the negro race."

Defense counsel stated that in her opinion that was not an appropriate question. She tried, however, to make clear to the court by reference to Aldridge v. United States [283 U.S. 308 (1931)] that she was making the request

appropriately under the law and that if her requests were refused the court had an obligation to frame its own question.

> " I [Mrs. Piel] have no pride of authorship. However, the issue should be raised." (Vol. II, 19)

To this the court responded:

> " I'm not here to paraphrase your questions. All I can do is to pass on the question as you submit them, and I decline." (Vol. II, 19)

Respondent mistates the record and is in error in the following:

> " Judge Palmieri in the present case offered to make the inquiry into racial prejudice which the Supreme Court and this Court have mandated, but defense counsel declined the offer." (emphasis supplied) [Resp. Br. p. 12]

Defense counsel expressed her own opinion on the proposed question speaking of "membership" in the negro race. If the court had chose to put the question it proposed, the issue before this Court might have been the adequacy of that question under Aldridge, and Ham v. South Carolina 409 U.S. 524 (1973). Since the court asked no question on the issue of race even though requested to frame its own question, that is not the issue; nor is there anything in the record to support respondent's assertion that defense counsel "declined" any "offer".

The court, thus after being put on notice refused to make any inquiry on the race issue, and such refusal, after United States v. Grant 494 F. 2d 120 (2 Cir 1974) was

clearly error requiring reversal of the conviction in this case.

Answering Point III

Respondent takes issue with appellant's Point III - - that defendant having indicated he wanted a lawyer in the course of Miranda warnings - - was not given a lawyer, did not waive his right to a lawyer, was interrogated and gave an incriminating statement.

Respondent states:

> " Kaufman [the interrogating attorney] further testified that Reed never requested the appointment of counsel for the purpose of the interview and that Reed never stated he wished to speak to a lawyer before answering any questions." [Resp. Br. p. 13]

The record shows that this is not true. A form filled out by Kaufman at the time reads as follows:

> Q " If you do not have funds to retain an attorney, an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?
>
> A Yes sir - - needs appointed lawyer.
>
> Q Understanding your rights as I have explained them, do you want to give me some information at this time about your background and your version of the facts?
>
> A [NO ANSWER] " (A-23)

Over objection that it was leading and called for a conclusion

in the face of this documentary evidence, the government asked Kaufman:

> Q " Did the defendant ever indicate to you that he wished to have an attorney appointed during the course of his interview?
> [objection overruled]
>
> A No he did not ever indicate that he wanted an attorney appointed during the interview. "
> [Vol. I, 16]

Thereafter on redirect examination, the government was permitted to bolster its testimony by putting questions to Kaufman, not as to what was said to the defendant and how the defendant responded but what Kaufman's "usual practice" was when he filled in a form such as the one involved, (Vol. I, 32) .

Cases cited by respondent (Resp. Br. p. 15) do not involve situations where it appears of record as it does here, that defendant requested a lawyer but that none was given him until the interrogation was completed.

Answering Point IV

The case at bar was a short trial indeed and, accordingly, the trial court's "entering the lists" against the defendant stood out to deprive him of a fair trial even though there are not numerous pages of testimony showing court interference. The entire trial including jury deliberation and the finding of the guilt of the defendant took place between

10 A.M. and 4 P.M. on February 13th and 14th, 1975. Pertinant portions of the record are set forth and referred to on pages 14, 15, 28, and 29 of appellant's brief showing how the court intervened to blunt defense counsel's cross-examination and blunt her impeachment of the veracity of the government witnesses. Said this Court in United States v. De Sisto 289 F. 2d 833 834 (2 Cir 1961):

> " [the trial judge] must not, however, usurp the function either of the jury or of the representatives of the parties and must take care not to give the jury an impression of partisanship on either side. "

In the case at bar the court's remarks on the issue of the credibility of the police-officer were as unnecessary as those in United States v. Guglielmini 384 F. 2d 602 605 (2 Cir 1967), and those remarks went further to rehabilitate the witnesses. the credibility of whom defense counsel challenged cf. United States v. Nazzaro 472 F. 2d 302 (2 Cir 1973). As in United States v. Fernandez 480 F. 2d 126, 736 (2 Cir 1973), the judge "telegraphed to the jury his adverse view on central issues in the case. "

Answering Point VI

As to Point VI, defendant sumbits that the record clearly presents the issue of entrapment under the bifurcated test set forth in United States v. Henry 417 R. 2d 267 (2 Cir 1969) cert. den. 397 U.S. 953 (1970). There is no question

under the facts that the agents approached the defendant seeking to make a buy of cocaine from him. The defendant told them he had a friend who would sell them "flake cocaine" but thereafter did nothing further about the sale and in fact left the scene without consumating the deal even though the agents were ready to wait further for him (Resp.Br. p. 3). As to the defendant being ready and willing to perform without persuasion, the record reveals that the defendant was not ready willing and able and did not perform. On the day he was supposed to join up with the agents and sell them the cocaine he did not do so. Under these circumstances the defendant was entitled to an instruction on his theory of the case - - that if any criminal conduct took place, entrapment was involved.

Moreover the record is really unclear on the facts since the police officers' testimony concerning conversations with the defendant and the tape recorded conversations do not bear each other out. The tape recorded conversations sound like preliminary negotiations. If we believe the officers, those conversations were the final culmination arrangement for the sale of 1/4 of a kilo of cocaine for $1,000.00. Yet for completely unexplained reasons, nothing happened.

Under these circumstances the error of the court below is not insignificant.

CONCLUSION

The judgment of conviction of the defendant James Reed should be reversed.

Respectfully submitted,

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Attorney for Appellant

August 6, 1975

2 Copies Received

Date August 7 1975

Firm Paul D. Carman, U.S. Attorney

By John D. Gordan III